No. 84-1044

In The

Supreme Court of the United States

October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, TOWARD UTILITY RATE NORMALIZATION, CONSUMERS UNION, CONSUMERS FEDERATION OF CALIFORNIA, COMMON CAUSE OF CALIFORNIA, CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, and CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,

Appellees.

On Appeal from the Supreme Court of California

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CONSUMER ALERT IN SUPPORT OF APPELLANT, PACIFIC GAS AND ELECTRIC COMPANY

RONALD A. ZUMBRUN
JOHN H. FINDLEY
COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Amici Curiae, Pacific Legal Foundation and Consumer Alert

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

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INTEREST OF AMICUS

This brief amicus curiae is submitted on behalf of Pacific Legal Foundation (PLF) and Consumer Alert pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for the parties and has been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized and existing under and by virtue of the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy of PLF is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The PLF Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of an amicus curiae brief in this matter.

Consumer Alert is a nonprofit corporation organized and existing under the laws of the District of Columbia, with offices in Modesto, California. Consumer Alert engages in the study and dissemination of information on problems and issues affecting American consumers and seeks to insure a fair and fully expositive presentation of matters affecting the public interest. Consumer Alert has approximately 6,500 members, supporters, and contributors from all areas of the country, including California. Members of the organization are able to participate fully in its proceedings and include California taxpayers, consumers, and users of electricity. Policy for Consumer Alert is set by a 12-member Board of Directors. The Board has authorized Consumer Alert to participate as amicus in this action.

Amici firmly believe that a review of this matter is necessary in order that the constitutional issues involved may be properly considered. The decision below granting an outside party the right to insert its material in mailings by Pacific Gas & Electric Company (PG&E) not only

violates the free speech and association rights of that utility, but also raises a substantial issue as to the propriety of government granting favored parties the right to speak while denying such right to others.

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STATEMENT OF THE CASE

In its Decision No. 83-12-047, dated December 20, 1983, modified by Decision No. 84-05-039, dated May 2, 1984, the Public Utilities Commission (PUC) of the State of California ordered PG&E, over PG&E's opposition, to insert in its billing envelopes materials from Toward Utility Rate Normalization (TURN), a private organization unrelated to PG&E. Under the order, PG&E is required to give TURN access to its billing envelopes four times a year for the next two years. The California Supreme Court denied review of this order in an unreported order on October 4, 1984.

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SUMMARY OF ARGUMENT

PUC's conclusion that the extra space in utility billing envelopes may be awarded to outside parties violates existing holdings of this Court that the envelope and its contents are the private property of the utility. The First Amendment freedom against forced association precludes PUC from compelling a utility to disseminate the views of outside parties with whom it may disagree. The First Amendment further precludes the state from selecting

who may, and who may not, use private property to speak to the public.

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ARGUMENT

I

THE CONCLUSION THAT THE EXTRA SPACE IN BILLING ENVELOPES BELONGS TO RATEPAYERS CONTRADICTS COURT HOLDINGS BINDING ON THE COMMISSION

The basic premise of the PUC decision, that the "extra space" in the PG&E billing envelope belongs to the ratepayers (PUC Decision No. 83-12-047 at 4-5) is wrong as a matter of law. PUC's incorrect rationale is that while the bill and necessary legal notices which may be included in the envelope are a necessary part of providing utility service to the customer, the use of any "extra space" in the envelope may not, under principles of equity, be considered PG&E property because it would provide "PG&E with a benefit beyond the mailing expense legitimately recoverable from the ratepayers." *Id.* at 5. Thus, PUC concludes that permitting PG&E to continue to use this space for publication of its newsletter, *Progress,* would "unjustly enrich PG&E and simultaneously deprive the ratepayers of the value of that space . . . ." *Id.*

That conclusion expressly contradicts holdings of this Court which are binding on the commission. *Board of Public Utility Commissioners v. New York Telephone Company,* 271 U.S. 23 (1926), rebuts the PUC conclusion that payment for services by utility customers creates any "equitable" interest in utility property used to render

services. "The relationship between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary. [Citation omitted.] The revenue paid by the customers for service belongs to the company." *Id.* at 31.

This Court thus rejected PUC's theory that the utility has an "equity" obligation toward its ratepayers. The opinion reemphasized this holding in the quoted statement: "Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses . . . . *By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience* . . . ." *Id.* at 32 (emphasis added).

The return envelope, the bill, the PG&E newsletter, and the space necessary in the billing envelope to transmit them to the customer are provided for the convenience of the ratepayer, but this Court made clear that the customer does not acquire any interest, including "equitable" interest, in the envelope or its interior space, "extra" or otherwise, used to transmit these materials.

The PUC decision attempts to distinguish the *New York Telephone* case, saying the "Supreme Court was clearly not prohibiting ratepayers from having property rights in objects associated with the utility's enterprise . . . ." PUC Decision No. 83-12-047 at 34. The above quoted passages from the case make clear that this was exactly what this Court was saying.

The precise issue of who owns the space in the billing envelope was resolved in favor of the utility in *Consolidated Edison Company of New York, Inc. v. Public*

Service Commission, 447 U.S. 530 (1980). There this Court prohibited PUC's New York counterpart from restricting the utility's use of the extra space in its billing envelope. In that case the commission was merely trying to restrain the utility from using the extra space as a vehicle to promulgate its own views. Here, PUC is forcing the utility to use the extra space as a vehicle to promulgate views of an outside third party with which the utility may not agree. This Court made clear that the commission had no authority to attempt to regulate the utility's use of the extra space in the billing envelope because it was not public property. The Court drew the specific distinction between the private property of the billing envelope space and the public property of the military base and city transit buses in *Greer v. Spock,* 424 U.S. 828 (1976), and *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974).

> "Consolidated Edison has not asked to use the offices of the Commission as a forum from which to promulgate its views. Rather, it seeks merely to utilize *its own billing envelopes* to promulgate its views on controversial issues of public policy. The Commission asserts that the billing envelope, as a necessary adjunct to the operations of a public utility, is subject to the State's plenary control. To be sure, the State has a legitimate regulatory interest in controlling Consolidated Edison's activities, just as local governments always have been able to use their police powers in the public interest to regulate private behavior. [Citation omitted.] But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property." *Consolidated Edison,* 447 U.S. at 539-40 (emphasis added).

This holding was repeated in *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37 (1983), in which the Supreme Court noted that the *Consolidated Edison* case did not concern access to government property. "Indeed, in Consolidated Edison, which concerned a utility's right to use *its own billing envelopes* for speech purposes, the Court expressly distinguished our public forum cases . . . ." *Perry Education Ass'n,* 460 U.S. at 49 n.9 (emphasis added).

Thus, this Court ha specifically found that the space in a utility billing envelope is not a public forum as PUC would make it, but is the private property of the utility. The envelope extra space does not belong to the public, neither to the ratepayer nor to PUC. It belongs to the utility which may use it for its owa purposes. PUC has no authority to prohibit or otherwise restrict a utility from using its own envelopes to carry its own newsletters. Indeed, PUC is prohibited by the First Amendment from doing so.

As this Court put it: "The bill insert prohibition does not further a governmental interest unrelated to the suppression of speech." *Consolidated Edison,* 447 U.S. at 590 n.9.

II

A UTILITY MAY NOT BE COMPELLED TO DISSEMINATE THE VIEWS OF OUTSIDE PARTIES

Where *Consolidated Edison* merely dealt with the issue whether the state agency could keep the utility from speaking, the PUC decision raises the issue whether PG&E can be forced to promulgate the views of others with which and whom it may disagree. The issue was

well framed and resolved in *Wooley v. Maynard,* 430 U.S. 705, 713 (1977):

> "We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so."

This Court noted that the right of freedom of thought protected by the First Amendment, made applicable to states by the Fourteenth Amendment, includes not only the right to speak but the right to refrain from speaking. *Id.* at 714. Thus, in *Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241 (1974), it was held that a Florida "right to reply" statute which granted political candidates equal space to reply to newspaper criticism violated the First Amendment. The Court there declared:

> "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.* at 258.

Concurring that same term in *Lehman v. City of Shaker Heights,* 418 U.S. at 306, Justice Douglas observed that the meaning of *Miami Herald* is that no one, whether the owner of a newspaper or a bus line can "be forced to include in his offerings news or other items which outsiders may desire but which the owner abhors."

PG&E's *Progress* may not rise to the journalistic level of the *Miami Herald,* but it is an offering by its

owner. And so is the billing envelope. The First Amendment does not permit its owner to be forced to forego the *Progress* in order to include in its billing envelope the items which PG&E abhors but are desired by outsiders such as TURN. Like the school teachers in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), PG&E falls within the protection of the First Amendment cases "because they have been prohibited, not from actively associating, but rather from refusing to associate." *Id.* at 234.

PUC's rationale in ordering PG&E to insert TURN's messages in PG&E envelopes is that it is not ordering the utility to publish TURN material as its own. PUC Decision No. 83-13-047 at 30-31. This analysis, consisting of little more than a page, is superficial in the extreme. PUC is ordering PG&E to accept, insert, commingle, and disseminate outside material with its own in the PG&E envelope. PG&E is thereby forced to associate itself with the TURN material. That is the crux of the First Amendment violation. Like the New Hampshire statute struck down in *Wooley,* PUC's decision requires that PG&E "use their private property as a 'mobile billboard' for the State's ideological message. . . ." *Wooley,* 430 U.S. at 715. Here, PUC is requiring PG&E to donate its property as a postal billboard to serve the ideological whims of the commission and, since the message borne by the utility is one forced upon it, the decision violates the First Amendment freedom against forced association.

Appellees seek to distinguish *Wooley* by citing *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980). *See e.g.,* TURN's Motion to Dismiss at 20-22. But appellees overlook the basis of *PruneYard's* distinction.

> "Most important, the shopping center by choice of its owner is not limited to personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message." *Prune-Yard,* 447 U.S. at 87.

But here, PG&E's billing envelope has not been open to the public to come and go as they please. Indeed, that is the crux of this case: the utility's desire to exclude outsiders from use of its billing envelope. Second, *Prune-Yard's* space was opened to all the public to speak. But here, even if no specific message is dictated by the state, PUC is very plainly dictating the messengers who will be permitted to speak from PG&E's property. PUC's recent Decision No. 84-10-062, dated October 17, 1984, denied the petition of the Committee of More Than One Million California Taxpayers to Save Proposition 13 the use of the billing envelope space. As discussed in the following argument, PUC's ruling in that decision raises the gravest of questions as to the dangers of governmental discrimination for or against particular messages or particular messengers.

III

THE FIRST AMENDMENT PRECLUDES PUC FROM CHOOSING PARTICIPANTS IN THIS FORUM

Perhaps the most disturbing aspect of this case is that in turning PG&E's billing envelope into a forum,

PUC is already choosing the parties who may and may not participate in that forum. And, most disturbingly, PUC is prohibiting access to this forum based on the identity of the applicants and the contents of their intended speech.

In justification for forcing PG&E to disseminate TURN's views PUC cited a compelling state interest in the "'fullest possible consumer participation in CPUC proceedings and the most complete understanding possible of energy related issues.'" PUC Decision No. 83-12-047 at 22. This lofty ideal lasted only until PUC Decision No. 84-10-062, dated October 17, 1984. That decision dealt with the request of the Committee of More Than One Million California Taxpayers to Save Proposition 13 for access to the extra space in utility billing envelopes for the purpose of providing information on the effects of Proposition 36 on utility rates (Decision Finding No. 1). The request was quickly denied on the basis that it did not allege that the committee has participated or intends to participate in PUC proceedings (Decision Finding No. 2) and that the request did not allege that the committee's use of the extra space will improve consumer participation in PUC proceedings (Decision Finding No. 3).

The decision leaves the unfortunate impression that PUC in denying access space to newcomers is supporting a classic "old boy" network of favored prior participants in its proceedings. By granting access to utility private property to some and not to others PUC fails to further the state interest claimed to justify the intrusion on First Amendment rights. If anything, the policy expressed in

the *Committee of More Than One Million* decision allows PUC not only to choose the permissible subjects for debate, but the debaters as well. Thus, PUC puts itself in position to control the search for political truth. *Consolidated Edison,* 447 U.S. at 538. The concept of equality of ideas is inherent in protection of free expression:

> "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' [footnote omitted] and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say." *Police Department v. Mosley,* 408 U.S. 92, 96 (1972).

PUC's exercise of arbitrary and total control over the identity of the speaker and the type of speech permitted or prohibited in PG&E's envelopes shows the wisdom of the *Mosley* rule. The First Amendment does not permit government to seize private property and divert it into a forum in which only those groups favored by the government may speak.

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CONCLUSION

In its Decision No. 83-05-13 as amended by No. 84-05-039, PUC has created a shocking intrusion not only upon PG&E's private property rights but upon the

First Amendment rights of the California utility ratepayers. In establishing arbitrary and adjustable criteria which grant to some favored outsiders the right to a free ride in the utility billing envelope, while denying that right to other parties less favored, PUC establishes a dangerous precedent. In order to guard against such selective determination by government as to who may use a forum and who may not, it is surely the safer path to prohibit PUC from entering this quagmire of discrimination. Amici, PLF and Consumer Alert, therefore urge that the decision of the California Supreme Court affirming the PUC decisions be reversed.

DATED: May, 1985.

Respectfully submitted,

RONALD A. ZUMBRUN
JOHN H. FINDLEY
COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Amici Curiae, Pacific Legal Foundation and Consumer Alert